

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2012-000138-001 DT

06/13/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT  
K. Waldner  
Deputy

STATE OF ARIZONA

COURTNEY E BARCLAY

v.

MOHAMAD YOUSSEF AYOUB (001)

DAVID CHAMI

GILBERT MUNICIPAL COURT  
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

**Lower Court Case Number 2011CT8660.**

Defendant-Appellant Mohamad Youssef Ayoub (Defendant) was convicted in Gilbert Municipal Court of driving under the influence. Defendant contends he is entitled to a new trial. For the following reasons, this Court affirms the judgment and sentence imposed.

**I. FACTUAL BACKGROUND.**

On July 5, 2011, the State filed a Complaint charging Defendant for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(3). Prior to trial, the State dismissed the (A)(3) charge, so the trial proceeded on the (A)(1) charge only, and began December 6, 2011. On December 8, 2011, the trial court met with the attorneys to advise them of what had transpired:

THE COURT: I don't know exactly the timing of it, but while we were in our afternoon docket, we got—we heard the knock on the door that they needed some assistance, and the bailiff went to find out what they needed. They asked her, as I understand it, what would happen if we don't agree and the bailiff instructed them—just told them right then that there would be a mistrial and a new jury would be polled [*sic*, on C.D., trial court said “pulled”]. She then instructed them to put any of their concerns in writing on the back of the verdict form so she could get it to us and left it at that. About—and then that was when I instructed her to contact both of you, actually, right then, because I figured we'd at least need you to address that situation, if nothing else.

While we were waiting for all of you to arrive, I don't know, maybe half an hour later, there was another knock at the door and they came out with a verdict. And so I immediately started doing my research and trying to figure out what we should do about the situation and whether it is a situation, but I wanted to inform you both before

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we go any farther, before we release them into the world in case there's something we need to do.

(R.T. of Dec. 8, 2011, at 5–6.) The prosecutor asked if the jurors had written anything on the verdict form, and the trial court said they had not. (*Id.* at 7.) Defendant's attorney asked:

MR. CHAMI: You're not going to tell us who has anything to—

THE COURT: I'm not saying a word.

(R.T. of Dec. 8, 2011, at 7.) The prosecutor said she was not sure whether there was a problem. (*Id.*) Defendant's attorney asked for 2 minutes, so the trial court went off the record. (*Id.* at 8.) According to the C.D., the trial court was off the record from 3:51:21 to 3:59:24. The following exchange then occurred:

MR. CHAMI: Your Honor, I would like to just clarify the chain of events. Did you say that they knocked on the door and the bailiff went back and asked the question and then the bailiff instructed them a new jury would be selected?

THE COURT: Correct. They indicated first to her that, as I understood it, what will happen if we can't agree on a verdict, and her answer was we—then the case is mistried and we pick a new jury.

MR. CHAMI: Okay.

THE COURT: Put it in writing.

MR. CHAMI: Okay.

THE COURT: Okay?

MR. CHAMI: Well, I would obviously then would like to preserve the record to the bailiff of—you know, for the bailiff giving that instruction and my objection to that.

(R.T. of Dec. 8, 2011, at 8–9.) The trial court then said it would proceed with the taking of the verdict, and that any motions for new trial could be addressed if it became an issue (presumably if there were a guilty verdict). (*Id.* at 9.)

The trial court had the jurors brought in, and they returned a guilty verdict. (C.D. of Dec. 8, 2011, at 4:02:26 to 4:02:37.) The trial court polled the jurors, and each said that was his or her verdict. (*Id.* at 4:02:47 to 4:03:00.) On December 8, 2011, the trial court imposed sentence, and on December 16, 2011, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: HAS DEFENDANT WAIVED ANY ISSUE ABOUT JUROR CONDUCT BY NOT MAKING A MOTION FOR A MISTRIAL.

Defendant contends it was improper for the bailiff to answer the jurors' question, and asks this Court to reverse the verdict and order a new trial. If the defendant fails to ask for a mistrial, the defendant will waive any claim of error on appeal. *State v. Laird*, 186 Ariz. 203, 207, 920

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P.2d 769, 773 (1996) (trial court sustained defendant's objection, admonished jurors to disregard testimony, and redacted objectionable language; court rejected defendant's claim that trial court should have declared mistrial on its own motion stating, "If a party wants a mistrial, it ordinarily must ask for one."); *see also State v. Mills*, 196 Ariz. 269, 995 P.2d 705, ¶¶ 11–13 (Ct. App. 1999). Further, the Arizona Supreme Court has said the following:

By not objecting, defendant failed to require the court to correct the error and, in our view, has waived that error. Defendant cannot take his chances on a favorable verdict, reserving the "hole card" of a later appeal on an evidentiary matter that was curable at trial, and then seek appellate reversal from an unfavorable verdict.

*State v. Valdez*, 160 Ariz. 9, 13–14, 770 P.2d 313, 317–18 (1989).

Although Defendant's attorney did say he "would like to preserve the record to the bailiff of—you know, for the bailiff giving that instruction and my objection to that," the transcript shows Defendant's attorney never made a specific objection. But more importantly, Defendant's attorney never asked the trial court to declare a mistrial. By asking this Court to reverse the jurors' verdict and order a new trial, Defendant's attorney is asking this Court to agree with his contention that, once the bailiff answered the jurors' question, that jury was tainted and could not longer render a legally valid verdict. If Defendant's attorney truly believed that to be the case, he should have asked the trial court to declare a mistrial and start afresh with a new jury. But it appears Defendant's attorney was of the opinion the State had not proved its case, as shown by the motions for judgment of acquittal made at the close of the State's case and at the close of the evidence, and by written motion made after the verdict. After the trial court discussed what had happened, Defendant's attorney and Defendant spoke in private for 8 minutes, and then returned and allowed the trial court to proceed with the jurors' verdict rather than asking for a mistrial. It thus appears Defendant's attorney and Defendant were hoping the jurors had reached a not guilty verdict. In such a situation, a defendant may not (to mix metaphors) "roll the dice" hoping for a favorable verdict, and reserve the "hole card" to seek appellate reversal if there is an unfavorable verdict. *See State v. Espinosa*, 200 Ariz. 503, 29 P.3d 278, ¶ 10 (Ct. App. 2001).

This Court notes, in several cases discussing the "hole card" theory, it involved an evidentiary matter that was curable at trial, and in the present case, Defendant contends the jurors were tainted and thus there was nothing the trial court could do to cure the problem. For two reasons, this Court concludes that contention does not benefit Defendant.

First, there were things the trial court could have done. The jurors did not indicate they were deadlocked, they only asked what would happen if they could not agree on a verdict. What the bailiff told the jurors was correct—if the jurors could not agree on a verdict, the trial court would have had to have declared a mistrial and selected a new jury. The trial court could have questioned the jurors to determine if in fact they had been deadlocked and determine if the bailiff's answer had any coercive effect on any juror.

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Second, in *Valdez*, the court stated as follows:

An objection would have *required* the trial court either *to declare a mistrial* or to instruct the jury that it not only should disregard the comment but that the comment was unjustified by the facts or the evidence and was merely an inadvertent, careless remark.

160 Ariz. at 13, 770 P.2d at 317 (first emphasis original; second emphasis added). Thus, the “hole card” theory applies when a possible course of action would be for the trial court to declare a mistrial.

Defendant further contends he has not waived this issue because the trial court told Defendant’s attorney, “Your issue is preserved for appeal purposes in the event of a conviction,” and “We’ve made our record as far as what occurred during the event, so that’s preserved.” (R.T. of Dec. 8, 2011, at 9.) To the extent the trial court said the record of what happened is preserved, the trial court was correct, although it would have made a better record if the trial court had the bailiff state in her own words what happened rather than having the trial court’s versions of what it heard the bailiff say. To the extent the trial court said the issue is preserved for appeal purposes, the trial court was correct because the record was such that Defendant could raise the issue on appeal. To the extent the trial court’s statement could be interpreted to mean there was nothing further Defendant need do to avoid waiving the issue, the trial court was incorrect. As discussed above, Defendant was required to move for a mistrial before being entitled to relief on appeal.

III. CONCLUSION.

Because Defendant contends the jurors were tainted by the bailiff’s answer and thus the jurors were no longer legally capable of rendering a verdict, Defendant should have asked the trial court to declare a mistrial and then start over with a new jury. Because Defendant chose to go ahead and have the jurors give their verdict (which Defendant hoped was a not guilty verdict), Defendant waived any challenge to the validity of the verdict the jurors did give. Based on the foregoing, this Court thus concludes Defendant is not entitled to relief on appeal.

**IT IS THEREFORE ORDERED** affirming the judgment and sentence of the Gilbert Municipal Court.

**IT IS FURTHER ORDERED** remanding this matter to the Gilbert Municipal Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen  
THE HON. CRANE MCCLENNEN  
JUDGE OF THE SUPERIOR COURT

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